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No. 80-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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[redacted] WINDFARMS, LTD.
[redacted] BRIEF AMICUS CURIAE
[redacted]

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MOTION OF WINDFARMS, LTD. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.1 of the rules of the Court, Windfarms, Ltd. ("Windfarms") moves for leave to file the attached amicus brief in the above-captioned case. Consent of the attorneys for the appellants and appellees has been obtained.

Windfarms' interest in this case stems from its role as a developer of wind-powered electric power generation facilities. Windfarms is in the process of developing an 80 megawatt facility at Kahuku Point, Oahu, Hawaii which is expected to begin supplying electric power to

Hawaiian Electric Co. in 1983. By 1985 the Kahuku Point "windfarm" will deliver enough power to meet 8.5% of the current requirements of the City of Honolulu and the Island of Oahu. In addition, Windfarms is planning, acquiring sites for, and negotiating with utilities in Hawaii and on the West Coast with respect to a number of other projects whose planned power output ranges from 4 to 350 megawatts.

The feasibility of each of Windfarms' projects is dependent in part upon the benefits conferred by Congress on "qualifying small power production facilities" in Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3. In the absence of such benefits, the projects may be uneconomic and subject to traditional public utility regulation, and it may become virtually impossible to obtain financing for them.

On February 27, 1981, Judge Harold G. Cox of the United States District Court for the Southern District of Mississippi held, *inter alia*, that Section 210 of PURPA impermissibly infringes upon the State of Mississippi's regulatory authority over utilities operating within the state. Citing the Tenth Amendment, the Supremacy Clause, and Article IV, Section 4 of the Constitution, the district court declared Section 210, among others, "unconstitutional and void." *Mississippi* v. *FERC*, No. J79-0212(C) (S.D. Miss. Feb. 17, 1981).

As *amicus*, Windfarms would address itself solely to Section 210 of PURPA, the only section of immediate concern to it, and would argue in support of appellants that the section is a valid exercise of Congressional authority. Indeed, Windfarms believes that the judgment of the district court should be summarily reversed because it is manifestly in error. Specifically, the judgment is flatly inconsistent with numerous decisions of this Court upholding federal regulation of utility rates and practices in interstate commerce and recognizing the pro-

priety of Congressional action designed to address pressing national problems.

Even if the Court were to conclude that the issues raised below deserve plenary consideration on the merits, Windfarms would argue as *amicus* that the portions of Section 210 that do not affect state regulatory authority should be upheld, and the judgment of the district court summarily reversed insofar as it voided them. The district court, and the parties before it, failed to differentiate between those portions of Section 210 that affect state regulation and those that do not. The portions of Section 210 that do not touch upon the regulatory authority of the states are unquestionably constitutional, are not subject to the rationale of the judgment below, and are severable from the remainder of the Section. These portions of Section 210, and their fate, were not addressed in appellants' Jurisdictional Statement, but are crucial to Windfarms and others in the field.

Windfarms accordingly requests that the Court grant its motion and consider the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF WINDFARMS, LTD.

INTEREST OF AMICUS CURIAE

Windfarms, Ltd. ("Windfarms") is a child of the national energy crisis. Its founders responded to the incentives for wind energy and other innovative and renewable resource technologies created by the Public Utility Regulatory Policies Act of 1978 ("PURPA"), P.L. 95-617 (November 9, 1978), one of the five parts of the National Energy Act, and they established Windfarms for the purpose of developing commercial wind energy projects that would generate electricity for sale to utility companies. As

project developer, Windfarms handles planning, site and equipment acquisition, engineering, and the sale of the electric output to utilities by means of long-term power purchase contracts. Windfarms also arranges the financing of the projects and manages them once they are operational.

As far as it is aware, Windfarms is the largest developer of commercial, wind-powered electric generation in the United States, and is in the process of developing several substantial projects. The most advanced in development will consist of approximately twenty windmills, each of 4 megawatts capacity, to be located on a 2,100 acre site at Kahuku Point on the north shore of the Island of Oahu. The project's 80 megawatt capacity represents approximately 8.5% of the current needs of the City of Honolulu and Oahu. Electricity from the Kahuku project will be sold to Hawaiian Electric Company under a power purchase agreement signed July 30, 1980, and the project has been certified by the Federal Energy Regulatory Commission ("FERC" or "the Commission") as a qualifying small power production facility under Section 210 of PURPA, 16 U.S.C. § 824a-3, and the regulations promulgated thereunder. *See* Order Granting Application for Certification as a Qualifying Small Power Production Facility and Granting Waiver, Docket No. QF80-13 (FERC, Oct. 3, 1980). Windfarms is currently in the midst of a major effort to raise the large amount of capital needed to construct the Kahuku project.

Windfarms plans to develop up to 1,000 megawatts of wind-powered electric energy generation capacity by 1990. It has reached agreement with Pacific Gas and Electric Co. for a 350 megawatt project to be located east of San Francisco and is currently engaged in site acquisition and negotiations with utilities for several other projects, including 240 megawatt projects in the Imperial Valley near Los Angeles and in the San Gor-

gonio Pass area near Palm Springs, California. Windfarms is also discussing wind energy projects with several utilities located in the power-short Pacific Northwest and is actively pursuing a land acquisition program in that region.

The decision of the district court could seriously jeopardize not only Windfarms' ability to obtain financing for the Kahuku Point project and others presently in negotiation, but also the continued growth of electric generation through use of renewable resources such as wind, biomass, waste, solar, etc. and through more efficient use of nonrenewable oil and natural gas.

Windfarms is only one of many companies that have responded to Congress' call for increased electric energy production by "cogeneration facilities" and "small power production facilities." *See* PURPA § 210. Cogeneration is the sequential production of "electric energy, and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes . . . ." PURPA § 201; Federal Power Act § 3(18)(A), 16 U.S.C. § 796(18)(A). It allows more efficient use of energy by permitting it to be used for more than one purpose. More "work" is done per unit of energy input, thereby conserving fuels such as oil and natural gas. A "small power production facility," such as Windfarms' Kahuku project, produces electric energy "solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof . . . ." PURPA § 201, Federal Power Act § 3(17)(A), 16 U.S.C. § 796(17)(A). Small power producers, in other words, produce electricity entirely without the use of petroleum fuels.

At the time Congress considered Section 210, it was estimated that, if the proper incentives were given, cogeneration alone could produce 10-14,000 megawatts of electric power by the year 1987, representing 7-10% of

the nation's electrical generation capacity.[1] This represents a savings of 200,000 barrels of oil per day and a reduction in oil imports of 18 to 37%.[2]

When it enacted PURPA, Congress recognized that there were three major impediments to increased cogeneration and small power production.[3] First, utilities have historically been reluctant to buy power from cogenerators and small power producers. Second, utilities have charged cogenerators discriminatorily high rates for back-up and supplementary power. Third, people are reluctant to construct qualifying congeneration or small power production facilities (collectively "QF's") when doing so subjects them to utility-type regulation, including restrictions on the types of activities in which a utility holding company may engage and cost-based rate regulation. *See* Public Utility Holding Company Act § 9, 15 U.S.C. § 79i; Federal Power Act § 205, 16 U.S.C. § 824d. Moreover, because they are not guaranteed a rate of return as utilities are, QF's must be given incentives to invest the capital necessary to build, enlarge, and maintain cogeneration and small power production capacity.

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[1] *See* Public Utility Rate Proposals of President Carter's Energy Program, Hearings on S. 1469 Before the Subcomm. on Energy Conservation and Regulation of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 141 (1977) (report of Wm. L. Renfro, Analyst, Futures Research, Library of Congress).

[2] *Id.* at 236 (attachment to statement of David J. Bardin, Dep. Administrator, Federal Energy Admin.); *Id.* at 126 (statement of Sen. Gary Hart).

[3] *See* 123 Cong. Rec. S13212 (daily ed. Aug. 1, 1977) (remarks of Sen. Percy); S16398 (daily ed. Oct. 5, 1977) (remarks of Sen. Hart); S16481 (daily ed. Oct. 6, 1977) (remarks of Sen. Percy); Cogeneration: Hearings Before the Subcomm. on Energy Development and Applications of the House Comm. on Science and Technology, 96th Cong., 2d Sess. 383 (1980) (testimony of John O'Sullivan, Chief Advisory Counsel, FERC).

Congress designed Section 210 of PURPA to remedy these problems. Section 210 requires the Federal Energy Regulatory Commission to promulgate rules requiring utilities to buy power from QF's at just and reasonable rates (not exceeding the utility's incremental or full avoided cost of producing power) and to sell back-up power to QF's at nondiscriminatory rates, and it authorizes the Commission to adopt rules exempting QF's from some state and federal regulations normally imposed on electric utilities.

By declaring Section 210 void in its entirety, the United States District Court for the Southern District of Mississippi [4] has cast a cloud on the continued ability of QF's to overcome the historical impediments to the development of cogeneration and renewable resource-powered electric generation noted above.[5] The cloud comes at a particularly inopportune time for Windfarms and others interested in developing QF's. Only today, some two and a half years after passage of PURPA, have projects advanced to the point where developers that responded to Congress's call, such as Windfarms, are prepared to go to the financial markets to raise the capital needed to construct new generating facilities. A declaration of the continued validity of at least portions of Section 210 is essential to assure investors and developers that these vital projects will be able to remain economically viable and avoid becoming ensnarled in utility-type regulation. For Section 210 to be cast into limbo, even for only so long as it takes the Court to hear and resolve the matter on the merits, may delay or seriously jeopardize the development of many potential qualifying facilities. Windfarms accordingly seeks summary reversal of the district court's judgment in whole or in part.

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[4] Final Judgment, *Mississippi* v. *FERC*, Civil No. J79-0212(C) (S.D. Miss. Feb. 17, 1981) (hereinafter "Final Judgment").

[5] In this brief, Windfarms addresses only the district court's ruling with respect to Section 210 as that is the only section of PURPA that directly affects the company.

SUMMARY OF ARGUMENT

The District Court's holding that Section 210 of PURPA is constitutional was erroneous and should be summarily reversed. Federal agencies have long regulated sales of electric energy in interstate commerce and their authority to do so, even where the connection to interstate commerce is remote or fleeting, has been upheld by the Court on many occasions. Section 210 of PURPA is part of a national effort to address a serious problem that ignores state boundaries, and it was drafted specifically to minimize interference with state authority and institutions. In light of the national scope of the problem it addresses and the long history of federal regulation in the area, Section 210 cannot be said to impermissibly infringe on an integral state function and therefore does not violate the Tenth Amendment. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Fry* v. *United States*, 421 U.S. 542 (1975).

Even if the Court deems it appropriate to give plenary consideration to the question of whether PURPA improperly infringes upon state sovereignty, it should summarily reverse the district court's judgment insofar as that judgment purported to void those portions of Section 210 that have no effect on state authority. Much of Section 210, including its authorization of exemptions from the Federal Power Act and the Public Utility Holding Company Act, deals solely with federal regulation. These portions, independent of those affecting state authority, further Congress' intent that Section 210 encourage cogeneration and small power production. It is therefore appropriate for the Court to sever those portions of Section 210 that affect state regulatory authority, note probable jurisdiction to determine their validity, and summarily reverse the district court's judgment as to the remainder of the Section.

ARGUMENT

I. THE DISTRICT COURT'S DECISION THAT SECTION 210 OF PURPA IS NOT AN APPROPRIATE EXERCISE OF CONGRESS' CONSTITUTIONAL AUTHORITY WAS ERRONEOUS AND SHOULD BE SUMMARILY REVERSED.

A. Enactment Of PURPA Was Unquestionably Within Congress' Power To Regulate Commerce.

Windfarms agrees with the Solicitor General that "[i]t can hardly be the subject of serious dispute that the Commerce Clause provides a legitimate source of authority for the enactment of PURPA." Jurisdictional Statement at 14-15.[6]

B. Section 210 Of PURPA Does Not Improperly Infringe Upon State Sovereignty In Violation Of The Tenth Amendment.

The relationship between PURPA and the Tenth Amendment is addressed in detail in the Jurisdictional

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[6] The authority of the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, to regulate wholesale sales of electrical energy is beyond constitutional question. *Jersey Central Power and Light Co.* v. *Federal Power Commission*, 319 U.S. 61 (1943); *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U.S. 515 (1945); *Federal Power Commission* v. *Southern California Edison*, 376 U.S. 205 (1964); *Federal Power Commission* v. *Florida Power and Light Co.*, 404 U.S. 453 (1972). The authority of the Commission to regulate wholesale transactions in interstate commerce in preeminent even where state commissions have previously regulated the precise transaction in issue. *Federal Power Commission* v. *Southern California Edison*, *supra* at 206-207, 215-216; *see also Connecticut Light and Power*, *supra* at 522-523. The power of federal agencies to regulate such transactions has been sustained even where the connection to interstate transmission of electricity is remote or fleeting. *Jersey Central Power and Light*, *supra* at 66-67; *Florida Power and Light*, *supra* at 476 (Douglas, J. dissenting).

Statement of the United States. We would add only two comments to the analysis of the Solicitor General.

First, even those major electric utilities that opposed enactment of Section 210, and are now petitioning to overturn the regulations promulgated by the Commission to implement the Section, concede that "[t]he Act carefully circumscribes the Federal Government's role in determining the proper relationships between a utility and its customers, . . . [a] sensitive area which Congress left primarily to the States." They agree that Congress was "carefully conscious" of the "discretion and authority" of the states when it enacted PURPA. Brief for Petitioners at 54-56, *American Electric Power Service Corp.* v. *FERC*, Docket No. 80-1789 (D.C. Cir., filed July 14, 1980).

Second, the regulations adopted by the Commission fully reflect the deliberately limited nature of Congress' intervention in state public utility regulation. The rules expressly provide for waiver of most of the Commission's rules under Section 210, including the requirement that a utility purchase electricity from a QF at the utility's incremental or "full avoided" cost, upon application of a state regulatory authority and demonstration that a rule or rate "is not necessary to encourage cogeneration and small power production and is not otherwise required under Section 210 of PURPA." 45 Fed. Reg. 12,237 (1980) (to be codified in 18 C.F.R. § 292.403). The rules leave to the states regulation of QF's constructed before PURPA was enacted. 45 Fed. Reg. 12,235 (1980) (to be codified in 18 C.F.R. § 292.304(b)(3)). And they delegate to state regulatory bodies the authority to resolve the key questions of how reliability, peak period and emergency availability, and the like are to be factored into the prices paid by utilities for power generated by QF's. 45 Fed. Reg. 12,235 (1980) (to be codified in 18 C.F.R. § 292.304(e)).

The only aspect of the treatment of the Tenth Amendment question by the United States in its Jurisdictional Statement with which Windfarms takes exception is the statement that the question is a "difficult" one. In view of the history of federal, state, and local cooperation in the regulation of utilities, and the decision of Congress to authorize grants to states to offset administrative costs incurred to implement Section 210, *see* PURPA § 141, 42 U.S.C. § 6807, it can hardly be said that when Congress enacted PURPA, it " 'exercise[d] power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.' " *National League of Cities* v. *Usery*, 426 U.S. 833, 843 (1976), *quoting Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975). Nor can unfettered state regulation of electric utilities that operate in interstate commerce (and have been subject to significant federal regulation for almost half a century) be said to be " 'essential to [the] separate and independent existence' " of the states. *National League of Cities*, *supra* at 845, *quoting Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911). Nor, finally, does Section 210, which does not interfere in any way with the structure of state utility regulation, "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 852.

Section 210 would survive Mississippi's attacks on it even if it *did* somehow interfere with an integral state function, impair the states' effective functioning, or displace the states' freedom to structure their regulatory efforts, because the intense national interest in energy resource conservation and development makes the case at bar far closer to *Fry* than to *National League of Cities*. In *National League of Cities*, the Court struck down general federal regulation of the terms and conditions of employment of state employees, a subject clearly integrally related to the structure and function of state government. In *Fry*, by contrast, the Court upheld a

federal statute temporarily freezing the wages of state and local government employees. That statute, like PURPA, was part of a national effort to address "an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall"; "[t]he means selected were carefully drafted" so as to interfere with the states' freedom as little as possible; and the statute "displaced no state choices as to how governmental operations should be structured . . . ." *National League of Cities, supra* at 853.

The energy crisis addressed by Section 210 of PURPA is surely as serious a problem today as the 6 percent inflation that faced the United States was in 1970. *Compare Fry* v. *United States, supra.* Similarly, the means chosen to meet our energy problems cannot be said to interfere with the states' freedom to a greater extent than the blanket freeze on state employee salaries upheld in *Fry.* And no structural changes in state regulation of any kind are mandated by Section 210.

Fry is controlling. *National League of Cities* is inapposite. The judgment of the district court was in error and should be summarily reversed.

II. EVEN IF THE COURT DOES NOT SUMMARILY REVERSE THE DISTRICT COURT'S DECISION IN ITS ENTIRETY, IT SHOULD REVERSE THE JUDGMENT TO THE EXTENT THAT IT PURPORTS TO DECLARE UNCONSTITUTIONAL PORTIONS OF SECTION 210 THAT HAVE NOTHING TO DO WITH ANY ALLEGED INFRINGEMENT OF STATE AUTHORITY.

A. The District Court's Judgment that Section 210 of PURPA is Unconstitutional Voided Portions of the Statute that Have No Effect upon the Authority of the State.

The issue raised by appellees below, and the rationale of the district court's judgment, dealt solely with PURPA's alleged infringement on state sovereignty. The district court declared that Section 210, among others, constitutes a "direct intrusion on integral and traditional functions of the State of Mississippi and violate[s] the Constitution of the United States, especially the Tenth Amendment, the Supremacy Clause [Article VI, Section 2] and a republican form of government as guaranteed by Article IV, Section 4 . . . ." Final Judgment at 1-2. The district court then declared Section 210 "unconstitutional and void" in its entirety. *Id.*

Most of Section 210, however, has nothing to do with state functions or authority. In fact, only three portions do. First, Section 210(e)(1) authorizes the Commission to exempt QF's from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities . . . if the Commission determines such exemption is necessary to encourage cogeneration and small power production." Second, Section 210(f)(1) requires state regulatory authorities to implement the rules issued by the Commission for each electric utility for which the state agency has ratemaking authority. Third, Sections 210(h)(2)

(A) & (B) permit the Commission and, in certain circumstances, others to bring actions to require state regulatory authorities to implement the Commission's rules.

The rest of Section 210 deals with purely federal matters: the authority of the Commission to issue rules binding on "nonregulated utilities"[7] (Section 210(f)(2)) and rules exempting QF's from parts of the Federal Power Act and from the Public Utility Holding Company Act (Section 210(e)). The arguments raised by appellees below and the district court's rationale do not address these provisions at all, although they were apparently struck down by the district court's sweeping decree.

Neither appellees below nor the district court attempted any attack on the federal portions of Section 210, and none is possible. As demonstrated above, there can be no doubt that Congress had the power under the Commerce Clause to enact Section 210. There is also no doubt that Congress had a rational basis for carefully crafting the statute as it did in order to deal with the perceived impediments to the development of QF's. Accordingly, even if the Court were to decide that the issues raised by appellees below concerning PURPA's infringement on state authority deserve plenary consideration on the merits, it would be appropriate to sever those portions of Section 210 that have any impact on state regulatory authority, confine consideration to them, and summarily reverse the district court as to the remainder of the Section.

B. When Part of a Statute is Deemed Invalid, the Court Can Sever the Invalid Part and Uphold the Balance.

The test for severance is well established:

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remain-

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[7] Nonregulated utilities, primarily public utility districts, are not regulated by state regulatory authorities.

> ing provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Champlin Refining Co. v. *Corporation Commissioner*, 286 U.S. 210, 234 (1932).

In recent years when state statutes, and particularly federal statutes, have been challenged as unconstitutional, this Court has shown a marked preference for severing those portions it finds invalid and upholding the balance. *See, e.g., United States* v. *Jackson*, 390 U.S. 570, 585-87 (1968) (severing death penalty provision from the Federal Kidnapping Act, 18 U.S.C. § 1201(a)); *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (severing a twenty year limitation on enforcement from the Higher Education Facilities Act of 1963, 20 U.S.C. § 754 (repealed 1972)); *Buckley* v. *Valeo*, 424 U.S. 1, 108-09 (1976) (per curiam) (severing and upholding the public financing provisions of the Federal Election Campaign Act of 1971, as amended in 1974).[8]

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[8] The only recent cases in which the Court has refused to sever involved state statutes and can fairly be characterized as extreme situations. In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court held unconstitutional an article of the Texas Penal Code that exempted from criminality *only* abortions performed for the purpose of saving the mother's life. The Court refused to sever the invalid provision and uphold the balance of the statute, because to do so would have left Texas with a statute proscribing abortions in *all* circumstances. 410 U.S. at 166.

In *Sloan* v. *Lemon*, 413 U.S. 825 (1973), Pennsylvania had enacted a statute providing tuition assistance to parents who sent their children to "nonpublic schools." The statute was held to violate the First Amendment's Establishment Clause. The Court refused to treat the law as having a separable provision for aid to parents of children attending nonsectarian "nonpublic schools" because the statute nowhere distinguished between sectarian and nonsectarian nonpublic schools and "to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." 413 U.S. at 834.

The cases on severance reveal a three part inquiry. First, does anything in the statute or legislative history suggest that the legislature would not have enacted the valid provisions independently of those to be struck down? *See Champlin Refining Co., supra* at 234; *Tilton, supra* at 684. Second, after the unconstitutional provisions are eliminated, is the remainder "fully operative as a law"? *Id.* Finally, does severing the invalid portion alter the substantive reach of the legislation?[9] *See, e.g., Roe* v. *Wade, supra* at 166; *United States* v. *Jackson, supra* at 586; *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

C. Severance is Appropriate in This Case.

Applying the severability test to Section 210, it is clear that the Court should sever and uphold those portions of Section 210 that do not infringe on state authority. Although severance would result in a pared down Section 210, the remainder would be "fully operative as a law" and would further the statutory goals of PURPA without expanding the power granted by Congress or distorting Congress' intent.[10]

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[9] While early cases focused on the presence or absence of a severability clause in the statute being construed, the Court has more recently noted that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). Like *Jackson*, where the Court reversed despite the absence of a severability clause, PURPA has no such clause.

[10] There is little question but that Section 210 itself is severable from the rest of PURPA and the rest of Title II. PURPA is in fact a conglomeration of separate statutes, and each substantive title is only loosely related to the others. Even within Title II, Section 210 stands independently. Most sections of the title are amendments to Part II of the Federal Power Act (FPA), but Sections 205, 209, and 210, which do not amend the FPA, stand apart from the rest of Title II and from each other. Only Section 210, and a few definitions in Section 201, have anything to do with cogeneration and small power production.

As discussed above, it is clear from the statute and its legislative history that the purpose of Section 210 is to encourage cogeneration and small power production by requiring utilities to deal fairly with QF's and by removing from QF's the burden of utility-type regulation. *See* Section 210(a); S. Rep. No. 1292, 95th Cong., 2d Sess. 98 (1978).

After severance, Section 210 would still enunciate the federal policy of encouraging cogeneration and small power production, and it would still enable the Commission to issue rules implementing that policy. The Commission's rules would continue to be binding on "non-regulated utilities", which provide a substantial portion of the available electric generation and distribution capacity in areas of the country such as the Pacific Northwest. These utilities would still be required to buy power from QF's at an amount not greater than their full avoided cost and to sell QF's back-up and supplementary power at non-discriminatory rates. Cogeneration and small power production would thus continue to be encouraged in these areas.

The exemption of QF's from the Federal Power Act (FPA), 16 U.S.C. § 824 *et seq.*, and the Public Utility Holding Company Act (PUHCA), 15 U.S.C. § 79 *et seq.*, both authorized by Section 210(e), would also be left standing after severance. These exemptions alone provide substantial assistance to QF's who can find a market for their electrical output even absent a federal requirement that utilities offer to buy the power. While some utilities have historically proven unwilling to purchase power from QF's at a reasonable rate, *see*, e.g., 123 Cong. Rec. S13212 (daily ed. Aug. 1, 1977) (remarks of Sen. Percy), others have not. Moreover, some states have enacted, or can be expected to enact, exemptions and requirements similar to those in Section 210 and the Commission rules, even without a Congressional man-

date. Hawaii, for example, has enacted legislation exempting small power producers from state regulation as public utilities, and Hawaiian Electric Co. has already entered into a contract to purchase the power that will be generated by Windfarms' Kahuku project. Accordingly, for those QF's, such as Windfarms, who can find a market for their output by means of a contract with a willing utility or by virtue of requirements imposed on utilities by state authorities, the only benefits sought from Section 210 are the exemptions from the FPA and PUHCA.

Nothing in the legislative history of PURPA suggests that Congress would not have enacted those portions of Section 210 that would remain after severance if it could not have enacted the more comprehensive regulatory scheme embodied in Section 210 as written. *Cf. Champlin* v. *Refining Co., supra,* at 234. Indeed, there is considerable discussion in the legislative history of the advantages of exempting QF's from the FPA and the PUHCA apart from any mention of the value or need for a similar exemption from state laws. *See, e.g.,* 123 Cong. Rec. S16398 (daily ed. Oct. 5, 1977) (remarks of Sen. Hart); S16473 (daily ed. Oct. 6, 1977) (remarks of Sen. Durkin).

In sum, the portions of Section 210 that would be left standing after severance—the rules applying to nonregulated utilities and the exemption of QF's from certain federal statutes—would be "fully operative as a law" and would not distort Congress' intent when it enacted PURPA. Accordingly, even if the Court should decide that the consistency of PURPA with the Tenth Amendment merits plenary consideration, it should sever those portions of Section 210 that affect state regulatory authority—those which (1) exempt QF's from state laws and regulations, (2) impose duties or obligations upon state regulatory authorities, and (3) permit suits to require state regulatory authorities to implement the Com-

mission's rules—and summarily reverse the district court as to the remainder of the Section.

CONCLUSION

For the reasons stated above, probable jurisdiction should be noted and the judgment of the district court should be summarily reversed in its entirety.

Should the Court believe that the question of the consistency of PURPA with the principles of state sovereignty embodied in the Tenth Amendment warrants plenary consideration, however, the judgment of the district could should be summarily reversed at least insofar as it purports to invalidate those portions of Section 210 of PURPA that do not address, and have no effect upon, state authority to regulate electric utility rates and practices.

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May 20, 1981